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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/685,574	10/16/2003	Selbourne S. Witter	23201.00	7177

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EXAMINER
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HAYES, BRET C

ART UNIT	PAPER NUMBER
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3644

DATE MAILED: 04/20/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Applicati n N .

10/685,574

Applicant(s)

WITTER ET AL.

Examiner

Bret C Hayes

Art Unit

3644

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-18 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-18 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |  |
|---|--|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. ____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)            |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>10-16-03</u> . | 6) <input type="checkbox"/> Other: ____  |

**DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

2. Claims 1 – 16 and 18 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

3. Re – claims 1, line 8, and claim 16, line 3, it has been held that the functional “whereby” statement does not define any structure and accordingly cannot serve to distinguish. *In re Mason*, 114 USPQ 127, 44 CCPA 937 (1957).

4. Claim 8 recites the limitation "at least one end" in line 2. There is insufficient antecedent basis for this limitation in the claim. Claim 8 is ultimately dependent upon claim 1, wherein “two opposing ends” has been recited. Any reference to the ends must be the same as originally presented. Examiner suggests --at least one of the (two – optionally) opposing ends--, for clarity.

5. Claim 18, line 2, and further claim 16, line 2, recite the limitation "at least two of said rungs/perches have a different diameter". Since two items cannot share a singular, different diameter, examiner suggests --at least two of said rungs/perches have different diameters from one another--.

6. Any unspecified claim is rejected as being dependent upon a rejected base claim.

***Claim Rejections - 35 USC § 102***

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

Art Unit: 3644

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

8. Claims 1, 3, 4 and 11 are rejected under 35 U.S.C. 102(b) as being anticipated by US

Patent No. 2,570,663 to Guarino as cited by Applicants.

9. Re – claim 1, Guarino discloses a perch **10** comprising: a shaft **11** having two opposing ends, the shaft **11** having a perching surface and a plurality of longitudinal grooves **12** defined in the perching surface; and an abrasive coating **13** disposed about a portion of the perching surface.

10. Re – claim 3, Guarino further discloses the grooves **12** arranged in a series of (two) parallel rows.

11. Re – claim 4, Guarino further discloses the abrasive coating **13** encircling the perching surface – as at **16**.

12. Re – claim 11, Guarino further discloses the abrasive coating **13**, **16**, being formed as a cylindrical shell disposed around the shaft **11** – as at **16**, again.

***Claim Rejections - 35 USC § 103***

13. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

14. Claims 2, 5, 6, 10 and 12 – 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Guarino.

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15. Re – claim 2, Guarino discloses the invention substantially as claimed as applied above except for the shaft 11 being cylindrical. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have the shaft be cylindrical, since it was known in the art that dowel rods are used in bird cages as perches and dowel rods are cylindrical. Alternatively, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have the shaft be cylindrical, since there is no invention in merely changing the shape or form of an article without changing its function except in a design patent.

*Eskimo Pie Corp. v. Levous et al.*, 3 USPQ 23.

16. Re – claims 5, 10, 14, Guarino discloses the invention substantially as claimed as applied above except for the selection of resin, sand, polyvinyl chloride tubing, at least one base coat of casting resin, and non-toxic, silica-free sand. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use resin, sand, polyvinyl chloride tubing, at least one base coat of casting resin, and non-toxic, silica-free sand, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re Leshin*, 125 USPQ 416.

17. Re – claims 6 and 13, Guarino discloses the invention substantially as claimed as applied above except for resin coating the perching surface and sand coating the resin, and the abrasive coating being wound around the shaft in a spiral. The method of forming the device is not germane to the issue of patentability of the device itself. Therefore, this limitation has not been given patentable weight.

Art Unit: 3644

18. Re – claim 12, Guarino discloses the invention substantially as claimed as applied above except for the abrasive coating being disposed about a center portion of the shaft. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have the abrasive coating be disposed about a center portion of the shaft, since it has been held that rearranging parts of an invention involves only routine skill in the art. *In re Japiske*, 86 USPQ 70.

19. Re – claims 15 and 17, Guarino discloses the invention substantially as claimed as applied above except for using a plurality of shafts, such as shaft 11, as rungs of a ladder. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use a plurality of shafts as rungs of a ladder, since it was known in the art that ladders are used in birdcages as perches. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to substitute the available rungs of a ladder with the shaft as disclosed by Guarino, since it has been held that rearranging parts of an invention involves only routine skill in the art. *In re Japiske*, 86 USPQ 70.

Re – claims 16 and 18, Guarino discloses the invention substantially as claimed as applied above except for at least two of the perches/rungs having different diameters. Whether intended or not, all perches/rungs on all ladders have at least inconsequential different diameters, since no two perches/rungs can be created absolutely identical to one another. Therefore, it would have been obvious to one having skill in the art at the time the invention was made to have the perches/rungs have different diameters. Further, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have the perches/rungs have different diameters, since it has been held that discovering optimum values of a result effective

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variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980). In this case, birds are adapted to perching on objects of myriad sizes and shapes; i.e., branches, power lines, hand-rails, rocks, concrete sidewalks, etc. To produce a ladder with rungs mimicking the natural habitat of birds would be well within the level of ordinary skill in the art at the time the invention was made.

20. Re – claim 19, Guarino discloses the invention substantially as claimed as applied to claim 17 and further to claims 5, 10 and 14 above.

21. Claims 7 – 9 are rejected under 35 U.S.C. § 103 as being unpatentable over Guarino in view of US Patent No. 6,684,818 B2 to Willinger et al.

22. Re – claim 7, Guarino discloses the invention substantially as claimed as applied above. However, Guarino does not disclose the shaft being hollow.

23. Willinger et al. teach a hollow shaft **50** in the same field of endeavor for the purpose of producing a lightweight perch for birds.

24. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Guarino to include a hollow shaft as taught by Willinger et al. in order to produce a light weight perch for birds.

25. Re – claim 8, Guarino discloses the invention substantially as claimed as applied above. However, Guarino does not disclose further comprising an end cap disposed over at least one of the ends of the shaft **11**.

26. Willinger et al. teach an end cap **60** disposed over at least one of the ends of the shaft **50** in the same field of endeavor for the purpose of providing a base.

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27. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Guarino to further include an end cap over at least one of the ends of the shaft as taught by Willinger et al. in order to provide a base.

28. Re – claim 9, Guarino discloses the invention substantially as claimed as applied above. However, Guarino does not disclose further comprising a hanger bolt extending from at least one of the ends of the shaft.

29. Willinger et al. teach a hanger bolt 85 extending from at least one of the ends of the shaft in the same field of endeavor for the purpose of mounting the shaft within a birdcage, as seen in FIG. 5, for example.

30. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify Guarino to include a hanger bolt as taught by Willinger et al. in order to mount the shaft within a birdcage.

### ***Conclusion***

Any inquiry concerning this communication should be directed to Bret Hayes at telephone number (703) 306 – 0553. The examiner can normally be reached Monday through Friday from 5:30 am to 3:00 pm, Eastern Standard Time.

If attempts to contact the examiner by telephone are unsuccessful, the examiner's supervisor, Charles Jordan, can be reached at (703) 306 – 4159. The fax number is (703) 872 – 9306.

bh

4/17/04

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